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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE COSTA MESA SANITARY
DISTRICT,

Plaintiff and Appellant,

v.

SANTA ANA REGIONAL WATER
QUALITY CONTROL BOARD,

Defendant and Respondent.

G055278

(Super. Ct. No. 30-2016-00848260)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Gregory
H. Lewis, Judge. Affirmed.

Harper & Burns and Alan R. Burns for Plaintiff and Appellant.

Xavier Becerra, Attorney General, Robert W. Byrne, Assistant Attorney
General, Michael P. Cayaban, Kathryn M. Megli and Theodore McCombs, Deputy
Attorneys General, for Defendant and Respondent.

I. INTRODUCTION

On Labor Day weekend 2013, an electrical power surge knocked out a sewage lift pump near the 73 Freeway. The pump was operated by the Costa Mesa Sanitary District (the District). The result was 79,000 gallons of raw sewage overflowing into an adjacent storm channel. The sewage then traveled about 150 yards to the Upper Newport Back Bay. Only 2,000 of the 79,000 gallons was recovered. About a year and four months later, on New Year's Day 2015, a District sewage line plagued by tree roots backed up in the same general area. This time 8,100 gallons of raw sewage made its way into the Back Bay through the same channel. Both overflows lasted less than a day.

The Santa Ana Regional Water Quality Board (the Board) sought an administrative fine (called "ACL" by the parties, for "administrative civil liability") against the District for both overflows. The maximum amount of the fine, based on the statutory limit of \$10 per gallon and \$10,000 per day (see Water Code, § 13385¹), was \$851,000. At the hearing, the Board's prosecution team recommended a fine of \$503,204. The District countered by arguing for a fine of \$205,000. The Board ultimately decided on a fine of \$364,130, which is about 72 percent of what the prosecution team had recommended, but only 42 percent of the statutory maximum.

The District sought a writ of mandate in superior court to vacate the fine, but lost. In this appeal from the judgment denying its petition for writ of mandate, the District presents two challenges to the \$364,130 fine. First is the assertion the Board abused its discretion in assessing \$364,130 because that figure is based on an improper evaluation of the degree of harm and potential harm to the "beneficial uses" of the Upper Back Bay from the overflows. On a scale of one through five, the Board thought the two discharges warranted a "4", or "above moderate" assessment of the damage. The District, on the other hand, earnestly contends that a "3", or "moderate" harm, was the

¹ All further statutory references are to the Water Code unless otherwise indicated. The "10-10" limit is found in subdivision (c) of section 13385. More on that statute anon.

appropriate level, relying on a number of other ACL cases against public sanitation agencies around the state where comparable (and worse) overflows were only assigned a “3” level.

The District also emphasizes the test results of a water sample taken the day after the Labor Day overflow. That test showed a mere 450 organisms per 100 milliliters of water, which was low when compared to the state standard of 10,000 organisms per 100 milliliters. That test, says the District, showed there was no appreciable harm to the bay as a result of the 77,000 gallon overflow.

We disagree. We think the Board was within its discretion in assessing the 77,000 gallon discharge at an “above moderate” level of harm. The other ACL’s around the state are inapposite, because those were the results of *negotiated settlements*. The District’s position resembles that of a criminal defendant who goes to trial, loses, and then complains that other prisoners got better deals by making plea bargains.

As to the test results, there was more harm in the two discharges of raw sewage into the Upper Back Bay than is acknowledged in the District’s argument. Besides organic material, the Board also had evidence of significant *non-organic* pollutants that would have settled into the sediment of the bay, including metals, pesticides and herbicides. Beyond that, sewage contains concentrations of synthetic fragrances that are particularly problematic for the health of water-life in places like the Back Bay.

The District’s second argument is more technical. There is a requirement in administrative law that agencies make findings that show the “the analytic route” between the evidence before the agency and the agency’s action. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515 (*Topanga*); see Gov. Code, § 11425.50.) The Board issued a seven-page decision explaining its reasons for assessing the District \$364,130, but that decision omitted *any* reference to fines assessed against other public sanitation agencies around the state. At the very least, says

the District, the matter should be returned to the Board to explain *how* the \$364,130 fine squares with other ACL fines. We reject this argument for the same reason we reject its earlier incarnation in the context of whether the Board had to assess the damage at a “moderate” as distinct from “above moderate” level – the irrelevance of the other ACL’s. The cases relied upon were the result of settlements, not fully litigated administrative hearings. In real estate parlance, there really were no true “comparables” before the Board. And given that the relevant statute (§ 13385) does not expressly require consideration of even true comparables by way of other fines, we cannot fault the Board for omitting the ACL’s proffered by the District.

Accordingly, we affirm the trial court’s judgment of denial.

II. BACKGROUND

A. *Bad Luck on Two Holidays*

1. *Labor Day 2013*

The District was not lucky on the Labor Day weekend of 2013. Back in May 2013, the District had fired (the record does not disclose the exact reason) the employee who had managed its Irvine lift station. That station is located fairly close to the Upper Newport Back Bay. But whatever his other faults, that employee had been the District’s “pump station expert.”² The District hired a successor, and engaged an outside contractor to train that new employee. But by the Saturday before Labor Day the employee had been done with training and on the job for only two weeks. That Saturday morning, an electric power surge knocked out the main pump at the station. There was an emergency generator on hand, but when the new employee arrived he didn’t know the right place to plug it in and had to spend time trying to find out.

² Sewage systems consist in part of gravity flow pipes, but gravity can only work so far, and lift stations are needed at various points. If a lift station doesn’t work, gravity takes over and sewage builds up quickly at the failed lift pump.

More bad luck afflicted the timing of the District's damage control efforts. The pump, the emergency backup generator, and the accompanying monitoring apparatus were all on the same circuit breaker. Thus the automatic notification system that might have immediately alerted District personnel to the failure of the main pump was itself knocked out. It wasn't until around 10:30 that morning that anybody was notified of the lift pump failure. It was then that a local resident noticed sewage coming out of a manhole cover in the area and notified Newport Beach authorities. Newport Beach personnel alerted the District about the lift station failure, and when the District's new employee finally arrived, it took another 20 minutes to figure out how to get the emergency generator going.

The morning did not get better. The failure of the lift pump meant sewage was flowing into a nearby stormwater runoff channel, called the "Santa Ana Delhi Channel." From there it traveled about 150 yards to the Upper Back Bay. With help from Newport Beach city staff, the pump was finally restored to power by about noon, but by that time the tide was ebbing and had reached its lowest point, which meant more sewage was drawn into the bay.

All told, 79,000 gallons of raw sewage made its way to the bay. Newport Beach staff helped recover about 2,000 gallons using a vacuum truck. The District tried to pump some back by 7 p.m., but since the tide was low, those efforts recovered no significant sewage. The result was a net 77,000 gallon overflow.

2. New Year's Day 2015

Similar misfortune plagued the District on the New Year's Day holiday in 2015. Underground sewage lines on the west side of the Back Bay run beneath residential housing in that area. One line, known as the "Indus" line, had been plagued by various misalignments, sags and cracks for years. The Indus line had been scheduled for prophylactic cleaning, but that cleaning had been delayed because of a rainy December. As one District witness pointed out to the Board, you can't clean a sewer line

when it rains. But that meant that by the beginning of the year, plant roots (the bane of even everyday homeowners who sometimes need to call roter companies to clean out their residential sewer lines) had so gummed up the Indus line that there was another overflow, again pouring into the Delhi channel and then to the Upper Back Bay.

And again, it was Newport Beach authorities who first learned of overflow because of oozing out of a manhole cover (at about noon that day) and then notified the District, or, more precisely, the District's after-hours emergency contractor. District personnel got to the scene around 1 p.m., but the District's responders had no equipment to locate the blockage. So it was not until close to 3 p.m. that Newport Beach staff, who had sewer cleaning equipment, were able to locate the blockage and clear it. Overall, 8,100 gallons of sewage had once again made its way into the Back Bay. None was recovered.

B. Administrative Proceedings

In April 2015, the Board sought administrative fines against the District for the two spills. A hearing was held in July of that year, in which the Board took in considerable information about the nature of the Upper Back Bay and the circumstances of the two overflows.

1. The Upper Back Bay: An Orange County Jewel – Just Don't Swim There

Legally speaking, the Upper Back Bay is one of the “waters of the United States” and thus governed by the federal Clean Water Act. (*Garland v. Central Valley Regional Water Quality Control Bd.* (2012) 210 Cal.App.4th 557, 559 [extended discussion of meaning of navigable waters under 33 U.S.C. § 1251].) However, calling it a “bay” is a bit of a misnomer. The upper portion of the bay is on the *inland* side of Pacific Coast Highway. There is very little in the way of waves. The bay might be better described as an inland delta (Wikipedia), an estuary (Newport Bay Conservancy's description) or a lagoon (our description from the pictures in the administrative record).

While in theory one might actually swim in its waters, existing pollution makes such contact with the water ill-advised. The Board heard evidence that the beaches of the bay have no less than 51 warning signs to the effect that actual swimming is not recommended.

The warnings against swimming are not surprising given that the bay is on the “303(d) list” of polluted bodies of water in California.³ And its polluted state is hardly surprising given that San Diego Creek flows directly into the Upper Back Bay after running through Irvine.⁴ As one of the members of the administrative prosecution team described it, the bay was already “pretty impaired” at the time of the two overflows.

But swimming aside, the Back Bay has, in the jargon of the State Water Resources Control Board, a lot of “beneficial uses.” It is home to Newport Dunes, a major recreational area consisting of about 104 acres, which has its own beach and bistro. There are restaurants at the Newport Dunes resort. The resort offers more than 400 cabins and boat slips. The Back Bay also offers kayaking and paddle surfing. A residential community fronts the bay.

Beyond the human uses, fish and shellfish live in the water. The bay is a major route for migrating birds. And it hosts an eelgrass restoration project. Eelgrass is a flowering underwater plant; it puts oxygen back into the water (sewage takes it out) and is itself a habitat for halibut and perch.

³ 303(d) stands for section 303 of the Clean Water Act which was codified as 33 U.S.C. section 1313. As Justice Rylaarsdam wrote for this court in *City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 163: “The Clean Water Act also requires states to ‘identify those waters within its boundaries for which the effluent limitations required by [the Act] are not stringent enough to implement any water quality standard applicable to such waters.’ (33 U.S.C. § 1313(d)(1)(A).) For these impaired water bodies a state must ‘establish a priority ranking for such waters, taking into account the severity of the pollution and the uses to be made of such waters’ (33 U.S.C. § 1313(d)(1)(A)), and ‘the total maximum daily load (TMDL) [] for those pollutants at a level necessary to implement the applicable water quality standards with seasonal variations and a margin of safety which takes into account any lack of knowledge concerning the relationship between effluent limitations and water quality.’ [Citations.]”

⁴ The EPA’s own website notes that San Diego Creek is itself a conduit for pesticides and thus on the 303(d) list. See https://www.epa.gov/sites/production/files/2015-10/documents/ca_sandiegocreek.pdf (as of Nov. 26, 2018).

On the day of each of the two spills, the Orange County Health Care Agency ordered the adjacent beaches closed for three days. The closures adversely affected (though the record is not clear precisely how much) the resort and restaurant businesses at the bay. One description of the Labor Day closure heard by the Board seems reminiscent out of the movie Jaws: With the public announcement of raw sewage pouring into the bay, people ran out of the water and headed toward the showers.

There was no actual testing of how much “pollution” (as distinct from a calculation of sewage) ran into the bay in each of the two overflows. But, as alluded to above, there was one test of organisms in the water conducted on the day after the Labor Day overflow. The state standard is set at no more than 10,000 organisms per 100 milliliters of water and the test showed only 450 per 100 milliliters in the wake of the overflows. A member of the prosecution team thus admitted there was no “proof that the water quality in the Back Bay was changed three days after either one of these spills.” Concomitantly, the District argued its overflows showed no “appreciable acute or chronic effects” to the bay. The District, in fact, asserted that each of the three-day closures on both holidays was a mere “precautionary closure.” There “was never [a] reading that there was a bad water quality there.”

On the other hand, the administrative prosecution team noted that sewage is hardly 100 percent organic. It also contains metals, pesticides and herbicides that are likely to settle on the bottom as sediment and thereby adversely affect fish, shellfish, and plants. Sewage also contains oil and grease and personal care products. And – this is a little known fact – sewage also contains considerable non-organic synthetic fragrances from household products (presumably the reason laundry detergent often smells nice). These “fragrances” do not biodegrade the way many other chemicals do and so can accumulate, as the prosecution pointed out, in “heavy concentrations in untreated sewage”

2. *Was the District Unfairly Singled Out?*

The Board noted that the maximum fine section 13385 would allow was \$851,000. The prosecution team sought only \$503,214 against the District. The District thought \$205,000 was the appropriate penalty. The District feels the \$364,130 fine the Board arrived at was unfair.

The State Water Resources Control Board (State Board) has published an “enforcement policy” for all regional quality control boards to follow in assessing administrative fines in cases of the discharge of pollutants into the waters of the United States. In 2015, the policy set forth a series of seven steps each regional quality control board should use. In this appeal, only two of the steps used by the Santa Ana Board are challenged: Step 1, which involves assessing the harm and potential harm done, and Step 7, which is a catch-all for consideration of “other factors as justice may require.”

As far as step 1 was concerned, the District vigorously argued that the appropriate assessment of the harm to beneficial uses was a “3” on a scale of 1 through 5, for “moderate threat.” The prosecution team thought a “4,” for “above moderate threat” was the correct number but the District pointed to some 13 cases of fines levied against public sanitation agencies around the state, some involving spills of as much as 2.4 million gallons. These all received a “3” on the harm-to-beneficial uses score, no “4’s” (above moderate). Moreover, says the District, those other fines should at least have been expressly considered by the Board when it came to step 7, the “justice may require” step. Surely *justice* would require that the fine levied against the District be commensurate with those other fines.

The Board concluded “4” was the appropriate level of harm. The comparison with other ACL’s around the state was totally omitted in the Board’s decision; all that portion of the decision said was that costs of investigation and enforcement were being added as a surcharge onto the total fine. The bottom line result

was a fine of \$364,130 as against a potential fine of \$851,000. That amounts to a cost of \$4.18 a gallon for the District's total overflow of 87,100 gallons.

The District sought a writ of administrative mandate in the superior court to vacate the Board's fine. Its petition focused on steps 1 and 7 of the enforcement policy. The District's point was that it should have received only a "3" at step 1 and in any event the "justice may require" factor in step 7 compelled a lowering of the end fine so as not to be disproportionate in comparison with other ACL fines.

The trial judge denied the requested writ, noting that "[n]early all of the other disputes [relied on by the District] were resolved with agreed settlements." The judge also noted that the public's enjoyment of the bay had been disrupted on two holiday weekends, hence an above moderate assessment of the harm was "justified." From the ensuing judgment of dismissal the District has now appealed.

III. DISCUSSION

A. *Step 1: The Other ACL's*

The District's argument is based on the State Board's aspiration to administer "Fair, Firm, and Consistent Enforcement" of ACL's. On appeal the District has paired down the 13 other ACL's to just 7. In five of those seven, the District notes, the amount of gallons discharged was higher than the District's 87,100 gallon total, and in all seven the per-gallon fine was significantly smaller than the District's \$4.18 a gallon fine. One public entity, Cambria, got away with 61 cents per gallon in the face of an overflow about four times as large as the District's.

The reason the trial judge was not persuaded by the District's argument concerning other ACL's leveled against other entities was that "[n]early all of the other disputes were resolved with agreed settlements." In fact, *all* of them were. The District's précis of the seven ACL's it now contends should have been taken into account in the Board's written decision does not identify a single one which was *not* the product of a settlement. (App. Opn Br. at pp. 14-18.)

Arguments not raised in the opening brief are waived. (E.g., *Winslett v. 1811 27th Avenue LLC* (2018) 26 Cal.App.5th 239, 248, fn. 6.) We therefore assume the District cannot identify any case in which the ACL was the result of a *fully litigated hearing* in front of a regional board such as the case at hand. The District's attempt to show inconsistency in enforcement founders on the fact that all its examples of more lenient treatment are the result of settlements. As the trial court noted, citing the famous *Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488, 499, a litigant expects to "pay less in settlement than he would if he were found liable after a trial."

Thus settlements of administrative liability can hardly be said to reflect what might happen in a case such as the District's where there was a full scale hearing followed by a formal decision of a regional board. And that's particularly true in light of the State Board's seven step enforcement policy: A number of the standard seven steps,

for example, involve factors that were not at issue in the case before us but might have been in the seven other ALC's. They include: whether a given fine might put the discharging entity out of business, the amount of the entity's cooperation in cleanup efforts, and whatever factors the entity can adduce in "mitigation." Such factors might very well have contributed to lower per-gallon *settlements* in the other cases, and we note the District makes no attempt to demonstrate that such is not the case.

Faced with the problem that the District's arguments try to compare its litigated apple with settlement oranges and are therefore of little use as precedent, the District counters with this rhetorical question: "[T]hen why are settlements published?"⁵ Several answers come to mind other than "for use as precedent." For one thing, such publication alerts the public to pollution caused by various entities including public ones, so as to raise the possibility that perhaps a change in management might be in order. For another, even negotiated settlements serve as a warning to potential dischargers, in effect saying to them, "here's the best you might get even if you settle." Finally, publication of settlements allows the public to monitor the actions of regional boards and determine whether they are too lenient or too harsh.

Thus, as far as this regional board was concerned in this case, it was writing on a blank slate. None of the seven ACL's cited by the District were determinative of the Board's determination of an appropriate fine, nor were they of significant precedential value.

2. Step 2: Those 450 Organisms

That leaves the District's attack on the merits of the Board's decision – the idea that assigning a "4" for harm to the bay was simply unreasonable. The standard of review on this point is abuse of discretion, and the District's argument that the score was unreasonable boils down to the test of organisms in the bay's water the day after the

⁵ They are posted to the State Board's website.

Labor Day overflows – apparently 450 organisms per 100 mililiters is pretty good by the 10,000 state standard. The District augments this argument with the thought that the three-day closure after each overflow was just overkill: Given the 450 number, there was no reason not to reopen the bay immediately.

But substantial evidence before the regional Board shows the Board acted reasonably in assigning a “4” to the harm factor, *despite* the 450 organism test. First, as those 51 signs warning beachgoers not to swim in the water under normal conditions show, the Upper Back Bay is already environmentally stressed. Lots of pollution is flowing in without the need for any more sewage. Or, apropos the District’s argument that the number of beneficial uses of the bay is overstated by including swimming, the real point is that the bay ought to be available for *contact* with the water – whether or not swimming is advisable. Raw sewage turns a mere recommendation into a command.

Second, the Board had evidence that sewage contains pollutants that are not accounted for with just a test of organisms-per-100-mililiters. Oil, grease and synthetic fragrances all settle in the bay’s sediment, and create potential harm to the waterlife of the Back Bay. The Upper Back Bay is an ecological resource: home to fish, shellfish, eelgrass and waterfowl.

Third, the Upper Back Bay is, as the trial judge noted, a major recreational center serving a major suburban area. Considerable numbers of people were inconvenienced by the sewage overflows that just happened to come on holidays when literally no one was minding the shop back at the District.

Finally, though the District complains that closing the bay for three days in the face of a test showing only 450 organisms in the water was overkill, the Board’s (and later the trial judge’s) assessment of the *potential* damage was certainly reasonable. Some 77,000 gallons of untreated sewage had just flowed into the bay – that speaks for itself. The county health care agency’s choice to err on the side of caution thus cannot be

faulted. The old adage about better safe than sorry would seem perfectly fitted for such a situation, and we are in no position to second-guess this call.

B. “*Topanga*” and the Statement of Decision Problem

There is a requirement in administrative law that agencies provide written decisions that state the “factual and legal basis for the decision.” (Gov. Code, § 11425.50, subd. (a); see Code Civ. Proc., § 1094.5.) The Supreme Court case most commonly associated with this requirement is *Topanga, supra*, 11 Cal.3d 506. *Topanga*’s comment that an administrative decision must “set forth findings to bridge the the analytic gap between the raw evidence and ultimate decision or order” (*id.* at p. 515) has become a staple of California administrative jurisprudence.

The District thus makes this argument: The main part of its defense before the regional Board was its assertion that the other ACL’s showed the danger of gross disproportionality in what the prosecution team was asking for. (And that same disproportionality infected the eventual fine of \$364,130). Yet, says the District, nary a word appears in the regional Board’s written statement about those other ACL’s. That, says the District, violates the need for written findings that bridge the gap between raw evidence and ultimate decision.

What we have already said about the issue of the ACL’s applies just as much on this issue. Since the ACL’s were not determinative – and only tangentially relevant – there was no need to bridge any gap between those ACL’s and the ultimate decision. The immateriality of the ACL settlements was particularly significant given that none of the statutory factors a regional board must take into account in assessing a fine include a comparison with other cases. Those factors are listed in subdivision (e) of section 13385.⁶ The closest the District can point to is the last factor, “other matters that

⁶ Here is section 13385, word for word, but arranged for easier reading:
“In determining the amount of any liability imposed under this section, the regional board, the state board, or the superior court, as the case may be, shall take into account
“the nature, circumstances, extent, and gravity of the violation or violations,

justice may require.” But justice, as we have shown, doesn’t require consideration of any negotiated settlements as against a litigated fine. They just aren’t *comparable* to fully litigated cases. So they need not have appeared in the Board’s statement of decision.

“whether the discharge is susceptible to cleanup or abatement,
“the degree of toxicity of the discharge,
“and, with respect to the violator, the ability to pay,
“the effect on its ability to continue its business,
“any voluntary cleanup efforts undertaken,
“any prior history of violations,
“the degree of culpability, economic benefit or savings, if any, resulting from the violation,
“and other matters that justice may require.

“At a minimum, liability shall be assessed at a level that recovers the economic benefits, if any, derived from the acts that constitute the violation.”

IV. DISPOSITION

The judgment is affirmed. Respondent shall recover its costs on appeal.

BEDSWORTH, J.

WE CONCUR:

O'LEARY, P. J.

MOORE, J.